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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The original majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit, filed on March 30, 1972, and the revised majority opinion and supplemental dissent filed on May 12, 1972, are re-

ported at 463 F. 2d 337 and are reprinted in Appendixes A and B (pp. A-1 through A-38) to the Petition for Writ of Certiorari filed in this case. The Memorandum Opinion of the United States District Court for the Eastern District of Missouri, filed on September 25, 1970, is reported at 318 F. Supp. 846 and is reprinted in Appendix D (pp. A-40 through A-49) to the Petition for Writ of Certiorari.

JURISDICTION

The original opinions of the three-judge panel of the Court of Appeals for the Eighth Circuit were filed on March 30, 1972. In response to petitioner's timely Petition for Rehearing en banc, the original majority opinion was modified on May 12, 1972, and rehearing was denied without prejudice to the right of either party to file a petition for rehearing addressed to the modified opinion. Petitioner then timely sought rehearing en banc on the modified opinion, which was denied by an evenly divided court on June 28, 1972. The Petition for Writ of Certiorari was filed on September 23, 1972, and was granted on December 4, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Under Title VII, is an employer's right to refuse to hire a job applicant who has committed illegal and unprotected acts against the employer nullified or circumscribed merely because the applicant is black?

2. In Civil Rights cases involving allegedly discriminatory acts, should the defendant be precluded from offering subjective evidence to explain his motivation for those acts?

STATUTES INVOLVED

This case involves the construction and interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, (Public law 88-352), the relevant portions of which provide as follows:[1]

Section 2000e-2:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964, §703(a)(1).

Section 2000e-2:

"(j) Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . ." Civil Rights Act of 1964, §703(j).

Section 2000e-3:

"(a) It shall be an unlawful employment practice for an employer to discriminate against any of his

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[1] This case arose under Title VII as it existed prior to the 1972 amendments (Public Law 92-261). It should be noted, however, that the 1972 amendments did not affect any of the statutory provisions or legal issues involved in this action.

employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Civil Rights Act of 1964, §704(a).

Section 2000e-5:

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title." Civil Rights Act of 1964, §706(g).

Section 2000e-7:

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." Civil Rights Act of 1964, §708.

STATEMENT OF THE CASE

Respondent Percy Green is a black citizen of St. Louis, Missouri. Petitioner McDonnell Douglas Corporation is an aerospace and aircraft manufacturer with its corporate headquarters in St. Louis County, Missouri, where it employs in excess of 30,000 people.

This case involves an individual claim of discrimination filed by respondent Green against petitioner McDonnell claiming that McDonnell violated Title VII of the 1964 Civil Rights Act ("the Act") when it refused to hire Green on July 26, 1965. This is not a class action or a "pattern or practice suit" but presents only the question of whether McDonnell violated the Act in refusing to hire Green. Respondent seeks reinstatement and back pay for himself as a result of petitioner's allegedly wrongful rejection of his employment application.

The original complaint filed in the District Court charged that McDonnell had refused to hire Green because of his opposition to petitioner's employment practices (A. 8). At trial, however, respondent presented extensive evidence in an attempt to establish that the decision was also motivated by the fact that respondent was black. In addition, Green also sought to prove that his previous layoff by McDonnell in 1964 was improperly motivated.

The District Court and the Court of Appeals properly held that the layoff claim, interjected for the first time at trial, was barred by the statute of limitations, and respondent has filed no cross-petition in this Court seeking review of that issue. Hence, the layoff is not before this Court. However, because the issue of racial discrimination against Green is allegedly involved in the refusal to rehire him, we will undertake here to trace Green's employment history with McDonnell, as found by the District Court. These findings were not disturbed by the Court of Appeals.

Events Leading Up to the 1964 Layoff

Respondent was originally hired by petitioner in 1956 (A. 52). He was a qualified mechanic, a member of the union, and was rated average by his supervisors (A. 323, 494). In 1962, he inquired about transferring from his union job to a non-union position in the laboratory department of the Electronic Equipment Division ("E.E.D.") (A. 58, 270). One of respondent's supervisors cautioned him against transferring out of his union status because of the danger of a layoff, the sacrifice of union seniority, and because the work in the department, connected as it was with the Gemini space project, was expected to decline (A. 100-02, 270, 342). At that time, respondent decided not to transfer but elected to remain at the position which he then held (A. 61, 102).

In 1963, Green reapplied for a position in the E.E.D. laboratory and was again cautioned about the hazards of such a move, which had increased because that department had neared completion of the Gemini simulator program (A. 62-63, 103-05, 272, 342). Nonetheless, he elected to take the job (A. 63) and was assigned work similar to that assigned to men with his grade and experience (A. 107, 287, 346). The record is replete with evidence that respondent was not treated differently by McDonnell than was anyone else (A. 271-74, 295-96, 344-46).

Green had been actively and publicly involved in civil rights activities and demonstrations since 1960 or 1961 and had received substantial publicity for some of his conduct (A. 69-70, 94, 208),[2] but such pursuits had not interfered

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[2] Green is no stranger to litigation as a result of his civil rights activities. See *e.g.*, *ACTION v. Gannon*, 450 F. 2d 1227 (8th Cir. 1971), involving the disruption of religious services and threats to defile religious sacraments; and *Koen v. Long*, 302 F. Supp. 1383, 1395 (E.D. Mo. 1969), *affirmed*, 428 F. 2d 876 (8th Cir. 1970), *cert. denied* 401 U.S. 923 (1971).

with his job and were not of any concern to McDonnell (A. 71, 239).

Some personnel in the E.E.D. were laid off in the spring of 1964, but respondent was not among them (A. 131-32, 288). But in August of 1964, because of the reduced manpower needs for the Gemini simulator program (A. 352), it became evident that more technicians had to be declared surplus, and the Company thereupon made reference to the standardized rating system known as the "totem pole," which had been compiled in April (A. 292, 319) and which was used as a guide for pay and promotional purposes and as a job evaluator (A. 289, 292-93, 354, 382, 441). Eighteen men, including respondent, were declared surplus (A. 352). Six of the men on the surplus list were higher than respondent on the totem pole (A. 353).

Efforts were made by petitioner, through its Personnel Department, to relocate these surplus men in various other departments to avoid having to lay them off (A. 110, 390, 396). In that connection, a voluntary test was administered to help determine the qualifications for men for higher job classifications which were open (A. 111, 394), but respondent refused to take the test (A. 355).[3] On August 28, 1964, Green was laid off together with eight other employees, all of whom were white and one of whom ranked higher than Green on the "totem pole" (A. 112, 292).

The "Stall-in" and "Lock-in"

After his layoff, and while McDonnell was still in the process of looking for alternative employment for Green,[4]

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[3] No evidence was presented as to the content of the test and no claim has been asserted by Green that the test was discriminatory.

[4] This task was complicated by Green's insistence that he receive preferential treatment and by his refusal to consider any job that involved a reduction in job status (A. 395-96, 444-45, 453).

he actively participated in a "stall-in" demonstration in October 1964, in which respondent and other members of CORE intentionally stalled their cars on the heavily traveled main roads leading to petitioner's plant at the time of a shift change (A. 399-403). The second demonstration led by respondent, in July of 1965, was at the Roberts Building, which housed some of McDonnell's offices, and resulted in some of petitioner's employees being locked in the building by the placing of a chain on the front door of the building (A. 132-33).

The "stall-in" was described in Petitioner's Exhibit "A" (A. 507-09, 329), and was not disputed by respondent. Five teams, each consisting of four cars, were to "tie up" five main access roads to the McDonnell plant at the time of the morning rush hour; the drivers of the cars were instructed to line up next to one another so as completely to block intersections and roads (A. 510). They were instructed to stop their cars, turn off the engine, pull the emergency brake, raise all windows, lock the doors and remain in their cars until the police arrived (A. 508). The plan was to have the cars remain in that position for one hour (A. 508).

Acting pursuant to this plan, a copy of which was in his possession, respondent drove his car onto Brown Road (a two-lane access road to the McDonnell plant) at approximately 7:00 a.m., at the start of the morning rush hour (A. 126-27). Respondent was aware of the traffic problems that would result (A. 127). He stopped his car on purpose with the intent to block traffic (A. 129-30). His car was in good running order but he refused to move it voluntarily (A. 129). Respondent's car was towed by the police, and he was arrested for obstructing traffic, a misdemeanor under Missouri law (A. 131). Respondent pleaded guilty to the charge of obstructing traffic and was fined fifty dollars (A. 177).

The "lock-in" arose out of a demonstration on July 2, 1965 in which respondent, as chairman of ACTION, another civil rights organization, was in charge of a picket line demonstration against McDonnell (A. 132). Prior to the demonstration, a member of ACTION stated his intention to chain the front door of the Roberts Building, which housed employees of McDonnell (A. 132). Respondent, the leader of the group, did not instruct him to refrain from this act (A. 132-33) and the door was in fact chained, locking petitioner's employees inside the building (A. 132-33). Respondent, as chairman of the group, testified that he approved the chaining of the door (A. 133).

The Employment Application

On July 26, 1965, three weeks after the lock-in, respondent applied for a job at McDonnell as a mechanic, a position for which he was qualified (A. 84). His application was forwarded the same day to R. C. Krone, McDonnell's Vice President of Personnel, and C. L. Windsor, the Director of Personnel Services, who rejected it on the spot (A. 405, 499). The District Court found that McDonnell refused to rehire Green because of his participation in the stall-in and lock-in.[5] 318 F. Supp. at 850.

When asked for his reasons for not rehiring Green, Windsor pointed unequivocally to the stall-in and lock-in (A. 405). Krone testified that Green had disqualified himself as a desirable employee by reason of the stall-in, which he characterized as "an overt act to disrupt the normal activities of our company tantamount to sabotaging our plant" (A. 455, 501).

Respondent filed a complaint with the EEOC contending that he had been denied re-employment because of his

[5] For the reasons set forth below in Point I.B., the principles involved in this case are the same whether the stall-in is considered alone or in conjunction with the lock-in.

race and because of his involvement in the civil rights movement. The EEOC found reasonable cause to believe that § 704(a) of the 1964 Civil Rights Act had been violated by McDonnell in refusing to employ Green because of his involvement in civil rights activities. The Commission made no finding with respect to the allegation premised on racial discrimination.

Pre-Trial Matters

Respondent's original complaint filed in the District Court contained allegations only that McDonnell had "intentionally engaged in an unlawful employment practice by having denied plaintiff employment because he has opposed practices made unfair employment practices by the law governing equal employment opportunities" (A. 8-9). Although, as noted, respondent did not purport to bring a class action, he nevertheless embarked promptly on a massive discovery campaign seeking access to and reproduction of literally hundreds of thousands of McDonnell records. Green filed interrogatories ("Set No. 2") requesting information concerning a period nearly eight years long detailing the composition of McDonnell's work force broken down by job classification and race, and sought further information about job transfers and promotions (A. 11). The information sought would have encompassed 662,000 applications for employment, 110,000 actual employment records in 1,400 job classifications (A. 17). It was estimated that the compilation of such information would require the services of three people working full-time for approximately three to six months (A. 17).

The District Court, on petitioner's objections, held these interrogatories to be oppressive and irrelevant (A. 18), following which respondent filed a motion to produce

essentially the same documents and information (A. 18). The court held that certain documents relating to respondent's application and testing of applicants would be required to be produced, but sustained objections to the remaining requests on the grounds of relevancy, stating, *inter alia*: "There is no allegation in the complaint that the reason the plaintiff was not employed was because he is a Negro" (A. 24).

The court held that good cause had not been shown for the production of over 70,000 files but did require the production of documents showing the requirements for initial employment, the written tests required, the oral tests or interviews required, those exempt from oral tests or interviews, the purpose of the tests or interviews, and the weight given to the rating resulting from such an interview or test as they existed in July 1965, when respondent applied for employment (A. 25).

It was at that point, following the discovery orders, that respondent filed an amended complaint asserting, for the first time, discrimination on account of race in addition to discrimination based upon civil rights activities (A. 25). Petitioner moved to strike the racial allegations on the ground that the EEOC had not made an affirmative finding of probable cause on that issue (A. 28). The District Court, relying on legislative history in a then-uncharted area, sustained the motion and held that an affirmative finding by the EEOC was a condition precedent to the institution of a federal court action (A. 31). Sometime thereafter, a significant trend of decisional law developed reaching the opposite conclusion, and it is clear from the record that the District Court thereafter departed from its ruling, and that the parties actually tried the issue of racial discrimination by consent. Under Rule 15(b) of the Federal Rules of Civil Procedure, the

pleadings were thus to be treated as though the racial issue had been raised, and any error in striking the allegations of the amended complaint was rendered harmless.[6]

The Trial

The case was tried on the merits for four days before the District Court sitting without a jury. The record is replete with evidence offered by respondent attempting to establish that both the layoff and the refusal to rehire were inspired by prejudice against him because of his race and color and because of his civil rights activities. Green filled the record with evidence concerning purported discrimination against him because of his attire (A. 59, 62, 97-99, 368). He also made repeated references to the racial composition of McDonnell's work force and of departments therein (A. 68-69, 72-73, 109-10, 156, 168, 297, 362-64, 464-67, 578). The racial climate at Cape Kennedy was even interjected into the case (A. 153-54, 311). There were also various references to charges of racism filed by Green with numerous agencies, including the EEOC, the President's Committee on Civil Rights, the Missouri Commission on Human Rights, the Department of Justice, the Department of the Navy, the Department of the Defense and the Office of Federal contract Compliance (A. 80-81, 228). And respondent's counsel cross-examined McDonnell's officers as to their own personal views about integration and racial discrimination (A. 360-61, 379, 414-15, 425-26, 456-57, 491-92).

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[6] Petitioner supplied respondent with all of the relevant material sought to be discovered by the motion for production and the interrogatories (A. 232-33, 267), and respondent at trial withdrew his *subpoena duces tecum* for Krone (A. 267). Nevertheless, Green on his appeal urged error in various pre-trial discovery orders entered by the court. The Court of Appeals, however, did not reverse any of the District Court's discretionary discovery rulings, and Green has not sought review of those issues here.

Respondent also put into evidence an analysis of the racial composition of petitioner's work force since 1943, which included a 13-page statistical breakdown for the relevant years concerning terminations, status changes, training, applications, job classification, longevity and miscellaneous other information relative to petitioner's non-Caucasian employees (Pl. Ex. 33, Tab 30).

It is abundantly clear that the issue of race discrimination was actually tried by the parties. The Memorandum Opinion of the District Court analyzed all of the evidence so submitted, and the Court of Appeals praised respondent's counsel for his resourcefulness. With respect to the layoff and the discussions which followed, the District Court noted that "plaintiff indicated at these meetings that he thought he was being laid off because of his race and civil rights activities." In stating the contentions presented by the evidence and by Green's post-trial brief, the trial court characterized them as follows:

> ". . . that defendant refused to rehire plaintiff because of his race, participating in civil rights activities and opposing practices made unlawful under the Civil Rights Act of 1964 . . ." 318 F. Supp. at 849.

The District Court observed that respondent urged racial discrimination as a basis for recovery but found, on a plenary record, that the stall-in and lock-in supplied the motivation for McDonnell's decision and that these activities were not protected by Title VII. Accordingly, it held that respondent was not denied employment because of his race or his legitimate opposition to McDonnell's employment practices, and judgment was entered for petitioner (A. 45).

The Appeal

Respondent appealed the District Court judgment to the Eighth Circuit, and oral arguments were heard by a three-judge panel on April 15, 1971. On March 30, 1972, each

member of the panel filed a separate opinion. The majority opinion, concurred in by two members of the panel, remanded the case to the District Court for further proceedings in accordance with the rules promulgated by the opinion. The majority opinion held (1) that the District Court was correct in determining that the layoff claim was barred by the statute of limitations; (2) that the District Court properly determined that the stall-in and lock-in were not protected activities under Title VII; (3) that the court's pre-trial order striking allegations of racial discrimination from the complaint was erroneous; (4) that this error was not harmless; and (5) that McDonnell's admitted reliance on the stall-in and lock-in were not sufficient reasons to justify its refusal to hire Green because petitioner did not establish the adverse affect of these demonstrations on Green's ability to perform the job applied for.

In remanding the refusal-to-hire aspect of the case to the District Court, the appellate court held that respondent had made a *prima facie* case of racial discrimination by showing that he was black and qualified for the job. The burden, according to the majority, then passed to McDonnell to prove by "objective evidence" that the reasons given for not hiring Green would adversely affect his ability to function as a mechanic. The concurring opinion disputed the District Court's finding that Green actively participated in the lock-in, and this observation was apparently made a part of the majority opinion. The only effect of this holding is to question whether McDonnell's connection of Green to the lock-in was accurate. The majority opinion of Court of Appeals did not set aside the finding that McDonnell was in fact motivated by the stall-in and lock-in but merely questioned the extent of Green's involvement in the lock-in and held that McDonnell was not entitled to rely on the lock-in.

Judge Harvey Johnsen dissented from each of the portions of the majority opinion which ruled adversely to petitioner. He stated that the majority had engaged in "artificiality" in its discussion of the lock-in issue but observed that whether the stall-in is considered alone or in conjunction with the lock-in, the District Court was absolutely correct in holding that McDonnell had a perfect right to reject respondent on the basis of the stall-in alone:

> "I should not suppose that a Gallup Poll would be needed to show that any employer with self-respect and with concern for his relations with his other employees hardly would hire a workman, whether white or black, who had engaged in such an unlawful vindictive misdeed against him, against his employees, and against his business being permitted to operate." 463 F. 2d at 348-49.

The dissent noted that a white person would not be entitled to a presumption of racial discrimination in identical circumstances and challenged the majority holding that a Negro applicant can make a *prima facie* case simply because he is black. Emphasizing that there was no suggestion of any racial motivation in the record, the dissent characterized the majority opinion as follows:

> "The effect of the majority holding is, as I view it, that even though no racial motivation was in fact involved on the part of McDonnell, and even though its refusal to hire anyone who had engaged in such unlawful acts against it as were involved would not afford Green any less opportunity for employment than it did a white who had engaged in the same unlawful acts against it, McDonnell could nevertheless not refuse to hire Green unless his presence in the plant would disrupt its operations." 463 F. 2d at 349-50.

The dissenting opinion took issue with the majority's erection of preferential standards for minorities and with

its misreading of this Court's opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The dissent also observed that the erroneous shift of the burden plus the preclusion of subjective evidence has made it impossible for McDonnell to defend this action. "What the court has held can, therefore, in my opinion, only mean that McDonnell is being required to rehire Green." 463 F. 2d at 350.

McDonnell filed a timely petition for rehearing and on May 12, 1972, the panel majority issued a "revised opinion" containing some primarily linguistic modifications of Point V of the original opinion, to which Judge Johnsen filed a supplemental dissent. As authorized by the order denying the original rehearing petition (A. 49), McDonnell renewed its request for an en banc determination, which was denied by a 4-to-4 vote of the Court en banc on June 28, 1972 (A. 49).[7]

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[7] After the Petition for Certiorari was filed here, counsel for Green submitted to the Court of Appeals a "statement" for counsel fees in connection with the appeal. On November 2, 1972, the three-judge panel, over petitioner's objections and without a hearing, awarded respondent an attorney's fee, with Judge Johnsen again dissenting. (See Docket Entries, A. 6.)

SUMMARY OF ARGUMENT

The Court of Appeals has drastically departed from the spirit and the letter of Title VII and has rewritten time-honored rules of procedure and evidence by announcing (1) that a black man establishes a *prima facie* case of racial discrimination by showing that he is black and qualified for a job, and (2) that the burden then shifts to the employer to prove by "objective" evidence that the reasons offered for not hiring the applicant were substantially related to the requirements of the job.

The language and history of Title VII clearly require the complainant to prove that the employer's challenged action was impermissibly tainted by discriminatory motivation. The Eighth Circuit, however, has held that the burden is immediately transferred to the employer to prove the absence of discrimination once a black complainant has established his race and qualifications. This rule is premised solely upon the color of the applicant, and its benefits are not available to white persons. It thus ignores Title VII's policy of color-blind equality and requires reverse discrimination.

The Court of Appeals has also held that once the burden has shifted, the employer may justify his refusal to hire a black applicant only on the basis of the applicant's ability to perform the job applied for. Petitioner's refusal to hire respondent was based upon respondent's illegal and unprotected activities directed against petitioner's operations and employees. These factors are racially neutral in conception and in operation, and do not create arbitrary racial barriers, but the Court of Appeals mistakenly relied upon *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), to require that McDonnell's rejection of Green, to be legal, must be based solely upon job-related factors. Such a re-

quirement is violative of §706(g), which specifically sanctions *any* employment decision made for *any* reason "other than discrimination on account of race, color, religion, sex or national origin or in violation of §704(a)." The unlawful misconduct engaged in by Green provided substantial reason for McDonnell to refuse to hire him because Title VII does not restrict the right of an employer to refuse to employ those who have interfered with the employer's operations and harassed his employees.

Finally, the Eighth Circuit erred in discrediting McDonnell's explanation of its motivation for rejecting Green's application. The majority opinion held that "subjective" evidence offered by an employer is essentially unworthy of belief, and that the employer must establish his defense by an objective demonstration. This holding runs afoul of the self-evident proposition that the employer is the best source of information as to the motivation for his decision and that he should, therefore, be allowed to testify on his own behalf as to why the action was taken. The trier of fact should be permitted to hear *all* the relevant evidence and determine the credibility of the witnesses and weigh their testimony. In a case in which a determination of motivation is critical, the fact finder cannot properly perform his function without considering credible "subjective" evidence.

ARGUMENT

I. An Employer Has the Right Under Title VII to Refuse to Hire a Job Applicant Who Has Committed Illegal and Unprotected Acts Against That Employer Even Though the Applicant Is Black.

It has long been recognized in labor law and civil rights cases that an employer may refuse to hire any person for good reason, bad reason or no reason, absent discrimination. See, *e.g., Truax v. Raich*, 239 U.S. 33 (1915); *Tims v. Board of Education of McNeil, Arkansas*, 452 F. 2d 551 (8th Cir. 1971). The effect of the majority opinion below is to repudiate this precept as regards minorities and to permit an employer to refuse to hire a prospective employee for good reason, bad reason or no reason *unless he is black*, in which case the employer will be presumed to have discriminated and will be required to show by "objective" evidence that the reason given was related to the applicant's potential job performance.

Petitioner submits, in accordance with the dissenting opinion in the Court of Appeals, that the rules formulated by the majority, predicated as they are solely upon the race of the applicant, subvert both the spirit and the letter of Title VII.

A. The Fact That Respondent Is Black Does Not Create a Prima Facie Case of Discrimination or Relieve Respondent of the Burden of Proving That Petitioner's Refusal to Hire Him Violated Title VII.

The cornerstone of the modified majority opinion of the Court of Appeals is contained in the following sentence:

> "When a black man demonstrates that he possesses the qualifications to fill a job opening and that he

has been denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination." 463 F. 2d at 353.

The effect of this holding upon the instant case, and upon civil rights cases generally, would appear to be twofold. First, as a practical matter, it effectively shifts the burden of proof, in cases where a black man is involved, from the plaintiff job applicant to the defendant employer. And second, it effectively discriminates in favor of a black man and against other job applicants. We submit that the Court of Appeals erred in promulgating this principle.

American jurisprudence has traditionally imposed upon the plaintiff the burden of proving his case. Nothing in the language or the legislative history of Title VII provides even the slightest intimation that any attempt was made by Congress in that statute to change the ordinary rules of proof. On the contrary, a Title VII action was expressly and consistently contemplated by Congress as proceeding "in the usual manner" with complainant having the affirmative burden of proving discrimination. See 110 Cong. Rec. 2560, 6549, 7212-14, 8350, 11848, 15866.[8] In the context of this case, then, respondent was required by the Act to establish by a preponderance of the evidence that he was refused employment because of his race or color or because of his lawful opposition to McDonnell's employment practices.

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[8] During the debates on the House floor, the following explanation of the burden of proof was offered by one of the bill's proponents: "The burden would be on the complainant to show that there had been discrimination . . . The burden all the way would be on those who alleged the discrimination. It is not the opposite; it is not a situation in which a charge can be brought against an employer and thereafter the employer would have to prove that he had not discriminated. He would not have a burden. It would be the other way around." 110 Cong. Rec. 2560.

The District Court, properly apportioning the burden in the historically accepted manner, found that respondent, despite four days of trial, 690 pages of testimony and the introduction of 47 exhibits, had failed to sustain his burden of showing that McDonnell's rejection of his employment application was motivated by respondent's race or by his legitimate opposition to petitioner's employment practices. The District Court, having observed the demeanor of the witnesses and having assessed their veracity, found that the evidence clearly showed that McDonnell's decision was inspired by the stall-in and lock-in and, therefore, that the refusal to hire was validly based upon Green's unprotected misconduct.

The Eighth Circuit did not in terms disturb the finding that the stall-in and lock-in were in fact the basis for McDonnell's action (although challenging the extent of Green's participation in the lock-in) and agreed with the holding that such activities are not protected by Title VII.[9] The District Court's findings were overwhelmingly supported by the evidence,[10] but the appellate court disapproved the standards applied by the trial court and remanded the case for further proceedings.

According to the Eighth Circuit majority, respondent established a *prima facie* case of racial discrimination

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[9] Hence, both lower courts have properly conformed to this Court's pronouncement in *City of Greenwood v. Peacock*, 384 U.S. 808, 826 (1966): ". . . [N]o federal law confers an absolute right on private citizens—on civil rights advocates, on Negroes, or on anybody else—to obstruct a public street."

See also, *Cameron v. Johnson*, 390 U.S. 611 (1968); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Commonwealth of Pennsylvania v. Hill*, 313 F. Supp. 1159 (W.D. Pa. 1970) and *Commonwealth of Pennsylvania v. Leonard*, 315 F. Supp. 215 (W.D. Pa. 1970), *both affirmed sub nom. Hill v. Commonwealth of Pennsylvania*, 439 F. 2d 1016 (3d Cir. 1971), *cert. denied* 404 U.S. 985 (1971).

[10] See the discussion in Point II, *infra*, relative to the Court of Appeals' criticism of the *type* of evidence offered by McDonnell.

merely by showing that he was black and qualified to fill a job opening which was denied him. Color alone, the Court held, can create a presumption of discrimination, and the employer must then come forward to prove the absence of a discriminatory animus. A white applicant-plaintiff in identical circumstances would not survive a motion for a directed verdict on such a meager showing, but a black plaintiff is said to be entitled to a presumption *simply* because of his color.

It must be borne in mind that the aim of Title VII is *equality of* employment *opportunity*, not a guarantee of employment. It was designed to be color-blind in its operation and to eliminate race as a factor in employment decisions. Congress, in Section 703(j) (42 U.S.C. § 2000e-2(j)), pointedly cautioned against preferential treatment for any group. Yet, in carving out special rules for blacks, the Court of Appeals has in actuality required discrimination against whites and has critically impaired the right of employers to make valid nondiscriminatory employment decisions. In the terminology of the supplemental dissent below,

> "... The majority thus are holding, not that Green is entitled to the same opportunity as a white, but that he is entitled to one of a different and greater degree." 463 F.2d at 355.

Under the Eighth Circuit's rule, if fifty technically qualified people—49 whites and one black—applied for a job and if, as would seem probable mathematically, one of the whites were hired for perfectly nondiscriminatory reasons, the Negro applicant would automatically have a *prima facie* case under Title VII, but the rejected whites would not. Even if no one were hired, the black applicant would be presumed to have been discriminated against on account of his race, but none of the white applicants could avail themselves of such an advantage. Such results, be-

sides being illogical, are totally at odds with the statutory purpose.[11]

In *Griggs v. Duke Power Co., supra,* at 430-31 this Court said:

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. ***Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.*** What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial and other impermissible classification."[12]

In Section 706(g), the Act specifically exempts from its proscriptions any employment decision which is made for any reason other than race, color, religion, sex or national origin or in violation of § 704(a). The Act is directed only against *discriminatory* decisions. In the Interpretive Memorandum submitted by the Floor Managers of the Act, the proponents stated, 110 Cong. Rec. 7213:

> "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a

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[11] A further problem arises by virtue of the fact that, while the Eighth Circuit's rule is stated in terms of a "black man," it must be remembered that the statute which it purportedly implements covers not only race and color but also sex, religion and national origin. The fallacy of the rule can be further demonstrated by postulating an application for employment by a qualified Baptist laborer. If he were refused a job, he could recover even though the employer was completely unaware of his religious affiliation. Similar incongruous results would eventuate in the case of women and, say, Canadians.

[12] Emphasis ours here and throughout this brief except as otherwise noted.

distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex and national origin. Any other criterion or qualification for employment is not affected by this title."

Discrimination, as prohibited by Title VII, means intentionally departing from normal procedure when dealing with minorities. Therefore, in order for a black plaintiff to establish a *prima facie* case of individual discrimination, in the absence of an unlikely admission of prejudice by the employer or, perhaps, a history of overwhelmingly pervasive exclusion of blacks from the employer's work force, the plaintiff must offer proof either (a) that he was intentionally treated differently than a white person was or would have been treated under the same circumstances or (b) that some inherently discriminatory standard was applied to him. In the context of an application for employment, it would seem essential to an individual black plaintiff's *prima facie* case to show either that a white man with lesser qualifications was hired instead of him or that his own qualifications were measured by a biased caliper.

The placing of such a burden on a Title VII claimant by Congress does not require him to prove facts peculiarly within the knowledge of the employer but merely means that he must be able to point to *some* facet of the transaction which indicates a departure by the employer from regular procedure and which creates a permissible inference that the employer's decision was improperly influenced by a discriminatory factor. The mere fact that the applicant is black does not satisfy that requirement.

The purpose of Title VII is indeed wholesome and salutary, and in fact its proper implementation is essential to

the realization of the ideal of true equality. Because the Act was born of compromise, however, its reach was intentionally confined, a circumstance which has caused some of the lower federal courts to believe that judicial revision and amplification is desirable. With respect to the issues presented by this case, however, the Court of Appeals' burden-of-proof rule does not further Title VII's mandate but in fact leads to results which are diametrically opposed to the expressed statutory purpose. Petitioner submits, in accordance with the dissent below, that the Eighth Circuit has sponsored favoritism rather than equality and, by its creation of presumptions based on race, has sanctioned reverse discrimination.

B. There Is No Requirement Under Title VII That an Employment Decision, Racially Neutral in Conception and Operation, Must Be Based Only Upon Job Performance.

The Eighth Circuit majority opinion appears to hold that the stall-in and lock-in could not be relied on by McDonnell as reasons for rejecting Green's application unless it could prove some connection between those activities and Green's ability to be a mechanic.[18] This holding, like the burden-of-proof rule, was presumably prompted solely by respondent's status as a Negro and is thus subject to the same legal and logical infirmities discussed above in Subsection A.

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[18] The original and revised majority opinions both contained the statements that "the district court failed to consider whether the reasons given by McDonnell for not rehiring Green were related to the requirements of the job," and "the record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required." 463 F. 2d at 342, 343, 352. This language seems to nullify the effect of the revised opinion's deletion of that portion of Section V containing an express requirement for tying the reason to the job. See the supplemental dissent, 463 F. 2d at 355.

1. This Case Does Not Fall Within the Rule of Griggs v. Duke Power Co.

The sole authority cited by the appellate court in support of its "job-related" requirement is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). With due deference to the Court of Appeals, we submit that the majority opinion is predicated upon a distorted reading of *Griggs* and represents an extension of Title VII which is totally unjustified by the history or the language of the statute or by the *Griggs* decision.

Griggs was a class action against an employer with a history of overt pre-Act discrimination. The issue presented to this Court was the validity of two standardized employment practices, *i.e.*, the requirement of a high school diploma and the successful completion of two general aptitude tests. These were employer-erected barriers to employment which, though neutral on their face and not intended to be discriminatory, "operated to render ineligible a markedly disproportionate number of Negroes." *Id.* at 429.

The purpose of Title VII, the Court stressed, was to achieve equality of employment opportunity and to remove roadblocks that historically had favored whites over blacks. The Court held that Negroes' substandard performance on the tests was directly traceable to race because of the inferiority of schooling which had been provided through the years for members of their race. Since the Act is designed to remove artificial, arbitrary and unnecessary barriers to employment which operate invidiously to discriminate on the basis of race, it therefore prohibits not only overt discrimination but also practices which are fair in form but discriminatory in operation. Also proscribed are practices, procedures or tests neutral on their face and neutral in terms of intent "if they operate to 'freeze' the status quo of prior dis-

criminatory employment practices." *Id.* at 430. The Court expressly disclaimed any suggestion that the employer's intent is irrelevant in a Title VII case, but held that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

The gist of *Griggs* was thus only that an employer has the burden of showing that any standardized job requirement *which has a tendency to reduce job opportunity because of race* has a demonstrable relationship to the job in question. The unanimous *Griggs* decision has no application to the issues presented in the instant case. Here the District Court was called upon to analyze not the validity of procedures or tests but simply the motivation of an employer in refusing to hire a single individual. The behavior to be scrutinized in this case is not that of the employer in formulating general practices which result in arbitrary barriers to employment, but that of the would-be employee who is seeking the benefits of the Act. The condition in which respondent finds himself here is not the regrettable result of years of racial subjugation and was not caused by publicly sanctioned deprivation of adequate education or training. His failure to gain employment with McDonnell resulted from his intentional and purposeful illegal activity.

Finally, we are not here concerned with an inherently discriminatory employer act, practice or decision, either as intended or as implemented. It goes without saying that any individual—whether black or white, Catholic or Protestant, male or female—who committed the deeds engaged in by Green would have been denied employment by any self-respecting employer against whom they were directed. There is no inherent or subtle discrimination in a decision not to hire a saboteur, and thus the "job-

related" test of *Griggs* does not come into play because of the absence of "built-in headwinds for minority groups." Clearly, the rejection of a white applicant under identical circumstances would not be required to be evaluated in terms of job performance, and the rules should not be changed solely on the basis of applicant's color.

2. Section 706(g) Permits Any Non-discriminatory Business Decision Made for Any Reason, Whether or Not Based Upon Job Performance.

The Eighth Circuit's approach to racially neutral employer decisions, discriminatory neither in their form nor in their consequences, is unrealistic and would produce bizarre results antithetical to the philosophy of Title VII. It deprives the employer of his legitimate right to make business decisions based upon valid, non-discriminatory business considerations. It further ignores the specific language of Section 706(g) of the Act, which provides as follows:

> "No order of the court shall require . . . the hiring . . . of any individual as an employee, or payment to him of any back pay, if such individual was . . . refused employment . . . *for any reason other than* discrimination on account of race, color, religion, sex, or national origin or in violation of § 704(a)."

Like the National Labor Relations Act ("NLRA"), Title VII was obviously intended "to leave unscathed a wide range of employer actions taken to serve legitimate business interests." *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 311 (1965).

The legislative history of Section 706(g) is instructive as to the Congressional intent. As originally drafted, the bill read much like § 10(c) of the NLRA (29 U.S.C. § 160(c)), in that it insulated only those employer actions

taken for "cause." The Celler Amendment, recognizing the limited purpose of the proposed legislation, struck the word "cause" from the bill, so that *any* employer action would expressly be beyond the pale of the Act if taken "for any reason other than discrimination on account of race, color, religion or national origin."

Representative Celler, the floor manager of the bill, explained his amendment, 110 Cong. Rec. 2567:

> "Mr. Chairman, the purpose of the amendment is to specify cause. Here, the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize 'other'—than discrimination on the grounds of race, color, religion or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion or national origin."[14]

The amendment, eventually adopted, was also characterized as clarifying the employer's right to discharge an employee for ineptness or drunkenness (110 Cong. Rec. 2570), or because he drank or smoked or swore (*Id.* at 2603).

Significantly, during the debate on Title VII, another amendment was offered which would have prohibited a union from giving a preference to any applicant in certain programs for "reasons other than *job qualifications*" and reasons which might be indirectly discriminatory on the basis of race. (110 Cong. Rec. 2593.) The amendment, while praised for its humanitarian aspirations, was denounced by Title VII proponents as not being germane to the issue of race discrimination (*Id.* at 2594, Remarks of Reps. Roosevelt and Griffin), and was defeated (*Id.* at 2595). Hence, Congress considered and rejected the very concept espoused below by the Court of Appeals.

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[14] Sex was added later as a classification of discrimination.

There is simply no foundation in law, equity or common experience for the Eighth Circuit's holding that the stall-in and lock-in must affect Green's future job performance in order to validate McDonnell's rejection of his application.[15]

3. The "Stall-in" and "Lock-in" Justified Petitioner's Refusal to Hire Respondent.

As noted, Section 706(g) is comparable to but even more explicit and restrictive than § 10(c) of the NLRA, which prohibits the reinstatement of any individual or payment to him of any back pay if he was suspended or discharged for just cause. In *Fibreboard v. N.L.R.B.*, 379 U.S. 203, 217 (1964), the Court observed that § 10(c) was intended to dispel the notion that "engaging in union activities carries with it a license to loaf, wander about the plant, refuse to work, waste time, break rules and engage in incivilities and other disorders and misconduct." The Court held in addition that § 10(c) was "designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." Neither does Title VII authorize prospective employees to engage in opprobrious misconduct against a company and then allow them to charge "bias" when their applications meet the fate which they should have readily anticipated.

A full rejoinder to Green's contentions was given in *Glover v. Daniel*, 318 F. Supp. 1070, 1075 (N.D. Ga. 1969), *affirmed* 434 F.2d 617 (5th Cir. 1970):

> ". . . [W]hile a teacher undoubtedly has the right to disagree with the boss and even to tell him off, *it has nothing to do with race to say that he does so at*

[15] Even in public employment, it is clear that job performance need not be the sole yardstick for measuring the fitness of an employee. *Beilan v. Board of Education of Philadelphia*, 357 U.S. 399 (1958).

his peril. Unquestionably, the First Amendment gives a teacher the right to speak his mind; *but it does not give him the right to disrupt a school* or to choose its principals *or to sabotage its programs.*"

McDonnell's rejection of respondent was not attributable to his status as an innocent victim of history or of his environment. Rather he had shown himself to be devoted to the disruption of McDonnell's operations. "There is no more elemental cause for discharge of an employee than disloyalty to his employer." *N.L.R.B. v. Local Union 1229, I.B.E.W.*, 346 U.S. 464, 472 (1953). Percy Green's behavior should not be required to be forgiven or forgotten by McDonnell unless Title VII was designed to abrogate widely respected concepts of civility and morality. In *Adler v. Board of Education*, 342 U.S. 485, 492 (1952), the Court, quoting with approval from *Garner v. Los Angeles Board*, 341 U.S. 716, 720 (1951), held that not even a public employer need blind itself to the trouble-making propensities of an employee:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. *Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.* Both are commonly inquired into in determining fitness for both high and low positions in private industries and are not less relevant in public employment."

Under the NLRA, it has consistently been held that an employer has the absolute right to discharge an employee who has participated in barring access to the employer's premises. *W. J. Ruscoe Co. v. N.L.R.B.*, 406 F. 2d 725 (6th Cir. 1969); *Victor Product Corporation v. N.L.R.B.*, 208 F. 2d 834 (D.C. Cir. 1953); *Oneita Knitting Mills v. N.L.R.B.*, 375 F. 2d 385 (4th Cir. 1967); *N.L.R.B. v. Indi-*

ana Desk Co., 149 F. 2d 987 (7th Cir. 1945); *N.L.R.B. v. Perfect Circle Co.*, 162 F. 2d 566 (7th Cir. 1947).

Both the NLRA and the Civil Rights Act condone only that type of demonstration or opposition which consists of lawful behavior. In *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), the Court upheld the right of an employer to fire employees who had participated in an illegal "sit-down" strike, stating at 252:

> "This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to refuse to retain in his employ those who illegally take and hold possession of his property."

The Board argued that the employer's previous unfair labor practices justified the employees' actions and required their reinstatement. Those contentions were rejected, the Court holding that no matter how reprehensible the employer's conduct, the employees must confine their retaliation to legal acts or avail themselves of their legal remedies or their right to strike, but they cannot expect judicial approbation of unlawful acts which infringe upon the rights of others:

> "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society. . . . We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct. . . . The conduct thus protected is *lawful* conduct."

See also *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31 (1942); *National Packing Co. v. N.L.R.B.*, 352 F. 2d 482 (10th Cir. 1965); *Buttny v. Smiley*, 281 F. Supp.

280 (D. Colo. 1968); *Esteban v. Central Missouri State College*, 415 F. 2d 1077 (8th Cir. 1969) *cert. denied* 398 U.S. 965 (1970). The reasoning of these decisions is even more apt when applied to the operations of a major government defense contractor like McDonnell.

If Green had a legitimate quarrel with McDonnell's policies, the appropriate vehicle for ventilating his views was the legal process of the EEOC and the courts, not the illegal blocking of streets and sidewalks. He cannot interfere with McDonnell's operations and harass its employees and thereafter claim an exemption for his actions because of his color. The fact that no violence or personal or property damage occurred, thanks to efficient police work, does not excuse Green's behavior. *W. T. Rawleigh Co. v. N.L.R.B.*, 190 F. 2d 832 (7th Cir. 1951); *N.L.R.B. v. Indiana Desk Co., supra.*

For this Court to approve the rules and the reasoning of the Eighth Circuit would be to give the judicial imprimatur to conduct such as that of respondent, and would thwart the mandate of Title VII by authorizing the substitution of physical self-help for conciliation. The District Court was correct in ruling the stall-in and lock-in[16] to be justifiable disqualifying factors, whether

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[16] The concurring judge in the Court of Appeals thought it significant that Green did not personally chain the doors of the Roberts Building during the "lock-in." The evidence is clear, however, that he was in charge of the demonstration and had advance notice of the plan to chain the door, in which he acquiesced. Those who participate in illegal protest activities and who actively cooperate with offenders are equally to blame and must suffer the consequences. *W. J. Ruscoe Co. v. N.L.R.B., supra; N.L.R.B. v. Longview Furniture Co.*, 206 F. 2d 274 (4th Cir. 1953); *Oneita Knitting Mills, Inc. v. N.L.R.B., supra.* In any event, even if McDonnell had been mistaken as to Green's role in the lock-in, such a misconception would not have tarnished its perfectly valid employment decision based on the stall-in. The record is clear that the individuals who made the decision had been advised that Green was the leader of the lock-in demonstration (A. 404), and their good-faith reliance on this information—even if mistaken in fact—would not constitute a Title VII violation.

or not they would have affected Green's job performance. To hold otherwise would be to allow respondent to profit by his own wrongdoing.

II. In Civil Rights Cases Alleging Discrimination, the Employer Should Be Allowed to Offer Subjective Evidence as to His Motivation, and the Weight to Be Accorded to Such Evidence Should Be Determined by the Trier of Fact.

The majority opinion of the Court of Appeals held in effect that "subjective" criteria are entitled to little or no weight in a case of alleged job discrimination. It dismissed petitioner's evidence of respondent's illegal activities as unworthy of credence in the context of a refusal to hire, and characterized it, and employer evidence generally, as "pretextual." The effect of the opinion, as the dissenting judge interpreted it, is to instruct the trier of fact that no evidence which petitioner might offer that the stall-in or lock-in occasioned the refusal to hire should be given any consideration.

Although, for the reasons cited above in Point I.A., McDonnell submits that Green failed to make a *prima facie* case of discrimination, nevertheless McDonnell did not rest at the end of respondent's case and did not merely deny any wrongdoing, but came forward with an abundance of creditable evidence of its motivation and established valid non-discriminatory reasons for refusing employment to Green. But according to the Court of Appeals, petitioner's evidence is suspect and cannot support its defense. We submit that the Eighth Circuit's effective abolition of "subjective" evidence was based on an erroneous premise, and the adoption of such a rule by this Court would hamstring the judicial process in its quest for truth.

Even if we assume, *arguendo*, that respondent made a *prima facie* case under the Act, then at most "the burden

is on the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The search in a discrimination case is for the employer's "real motive" in an attempt to identify and rectify employment decisions prompted by racial or other forbidden prejudices. *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132 (1937); *Radio Officers v. N.L.R.B.*, 347 U.S. 17 (1954); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937). Once a *prima facie* case of discrimination has been made out, the inquiry should then focus upon whether the employer's conduct was primarily motivated by racial animus and was thus unlawful. *N.L.R.B. v. Brown*, 380 U.S. 278, 288 (1965); *Radio Officers v. N.L.R.B., supra; Teamsters Local No. 357 v. N.L.R.B.*, 365 U.S. 667, 675 (1961). The unprecedented holding of Court of Appeals has severely hindered this investigatory process by its command that the employer's subjective explanation for his actions be disregarded.

A requisite of the orderly functioning of our legal system is the entrustment of the fact finding process to the jury or court, under proper standards, and the recognition of the fact finder's superior ability to appraise a witness' candor and to evaluate the testimony given by that witness in the light of his interest in the outcome of the lawsuit. Often the most critical and difficult inquiry which must be made by the fact finder is that of motivation, for in a wide variety of legal actions, the actor's intent or motivation is outcome-determinative. Nonetheless, in anti-trust,[17] tax,[18] and other civil cases,[19] as well as in crim-

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[17] *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

[18] *Commissioner v. Duberstein*, 363 U.S. 278 (1960); *Rudolph v. United States*, 370 U.S. 269 (1962).

[19] *Bank v. Kennedy*, 17 Wall. 19 (1872).

inal proceedings,[20] this Court has consistently afforded the defendant the right to state his intent and has allowed the trier of fact to determine the trustworthiness of the witness and the weight to be given to his testimony. For example in *Wallace v. United States*, 162 U.S. 466, 477 (1896), the Court stated as follows:

> "It has often been decided that where the intent is a material question, the accused may testify on his own behalf as to what his intent was in doing the act."

Certainly if such a rule is appropriate in a criminal case, where the witness' very freedom is at stake and the risk of falsified testimony is thus maximized, there is no reason to foreclose an employer from explaining his state of mind in a Title VII case. No court had so held until the Eighth Circuit decision under review here. While the Court of Appeals' rule ostensibly referred only to the "weight" to be granted to subjective evidence, in operation it actually functions as one of admissibility, or, perhaps more accurately, as a substantive rather than an evidentiary rule. Even on the compelling facts of the instant case, McDonnell's clear showing of its motivation is, under our reading of the opinion of the Court of Appeals, to be given no weight whatsoever. As a practical matter, the evidence is relegated to the same status as if it had been declared totally inadmissible.[21]

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[20] *Wallace v. United States*, 162 U.S. 466 (1896); *Crawford v. United States*, 212 U.S. 183 (1909).

[21] To the extent, however, that we *are* in fact concerned with a question of weight rather than admissibility, the Eighth Circuit has disregarded the well-established doctrine that the task of weighing the evidence properly belongs to the district court. *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29 (1944); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944); *Aetna Life Insurance Company v. Ward*, 140 U.S. 76 (1891).

The apparent thesis underlying the Court of Appeals' abolition of subjective evidence is a suspicion that men may lie when questioned about their motives. Such reasoning smacks of the old common law rule which rendered a party to an action incompetent to testify because of his interest in the outcome of the litigation. For years, however, modern courts have recognized the ability of the fact finder to weigh the interest of a witness in assessing his veracity. *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404 (1962).[22] This Court's opinions in the labor cases, see *N.L.R.B v. Great Dane Trailers, Inc, supra*, have specifically acknowledged that the person who makes the challenged employment decision is the best possible source of knowledge as to why it was made, and he should be allowed to state the reason. The safeguard of cross-examination, as well as the fact finder's opportunity to observe the witness' demeanor, provides ample protection against the possibility that perjured testimony might carry the day. In *Commissioner v. Duberstein*, 363 U.S. 278 (1960), the Court reaffirmed its adherence to the historically recognized role of the fact finder, in language befitting a Title VII case:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience of human conduct to the totality of the facts of each case. The non-technical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with the various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact."

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[22] If we repose such confidence in administrative agencies and lay jurors, certainly at least the same respect must be paid to federal district judges.

The "objective evidence" rule formulated by the Eighth Circuit was not advocated by any of the parties to this case but was conceived by the panel majority *sua sponte*, as were the burden-of-proof rule and the job-relatedness test. Cited in support of this prohibition of subjective evidence was a school-teacher displacement case decided by an appellate panel of which the authors of the majority and concurring opinions below were members, *Moore v. Board of Education of Chidester School District*, 448 F. 2d 709 (8th Cir. 1971). There it was held that where the number of available public teaching jobs is reduced by virtue of the implementation of a desegregation plan, teacher layoffs must be measured against objective criteria, such as amount of education, experience, and the like. Such rules have no relevance in a case where the judicial inquiry seeks only to determine the reasons why a particular job applicant was refused employment. Nor are such standards adaptable to applications for employment in private industry, where the circumstances are likely to be infinitely varied and where the statute authorizes rejection of a prospective employee for any reason other than a discriminatory one.

In *Fluker v. Alabama State Board of Education*, 441 F. 2d 201 (5th Cir. 1971), the court rejected the contention that a school board could justify its termination of a non-tenured teacher only by demonstrating "that he has failed to comply with some previously announced standard." The court acknowledged that such a principle would afford security for school teachers but found it wanting in law and deleterious to the school's right to upgrade its faculty and academic standing, stating, at 207:

> "Appellants' proposal of this requirement also ignores the highly subjective nature of employer-employee relationships. . . . We can see that . . . there are an enormous number of fact situations in

which the non-reappointment of an employee may be justified by highly subjective and perhaps unforseeable considerations."

Like the dissenting judge below, petitioner is at a loss to understand how an inquiry as to motivation can be undertaken on the basis of only "objective" evidence or, for that matter, to understand what "objective" evidence is in the context of the instant case. Would it require McDonnell to have a *written* policy of not hiring anyone who had intentionally disrupted traffic or locked its employees in a building? Did the Court of Appeals mean to say that a suspected embezzler or arsonist *could not be* rejected unless the employer can point to some objective standard covering the situation? Common sense confirms the existence of such policies but also demonstrates the needlessness of reducing them to writing and the futility of attempting to anticipate the almost infinite number of possible factual variations.

In summary, the District Court committed no error with regard to the admissibility or weight accorded to McDonnell's testimony as to its reasons for not hiring Green.

CONCLUSION

The record amply supports the determination of the experienced trial judge that McDonnell acted within its rights in refusing employment to Green. The District Court tried this case under proper standards and reached the right result. The Court of Appeals misconstrued the statute and this Court's opinion in *Griggs,* improperly assigned the burden of proof and erroneously restricted the evidence which could be considered in explanation of petitioner's actions.

Accordingly, the opinion and judgment of the United States Court of Appeals for the Eighth Circuit should be vacated and the cause remanded to that Court with instructions to enter an order affirming the judgment of the District Court.

Respectfully submitted,

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